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No. 95-1399

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MARLYN EADES and JOAN EADES,

Petitioners,

v.

CLARK DISTRIBUTING COMPANY, INC.
and LESLIE DALE TROVILLION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Marlyn and Joan Eades respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on December 1, 1995. Respondents' arguments (and lack of arguments) highlight why this Court should issue a writ of certiorari on the question presented in this case.

I. This Court Should Grant the Petition for Certiorari in Light of the Fact that the Sixth Circuit has Decided this Important Question in a Way that Conflicts with the Relevant Decisions of this Court

The Respondents contend that the "sole issue" raised by the Petitioners to this Court was "previously and properly decided in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)." Respondents' Brief in Opposition at 4. As a result, the Respondents' arguments consist of little more than lengthy quotations from the *Walker* opinion, an assertion that the Petitioners' reliance upon *Hanna v. Plumer*, 380 U.S. 460 (1965) is "misplaced," and an accusation that the Petitioners have "completely ignored the holding of *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949)." *Id.* at 4-8.

In fact, the Respondents have asked this Court to repeat the very error which was made below by the United States Court of Appeals for the Sixth Circuit: to reject the Petitioners' argument, and deny this petition, based simply upon the *Walker* holding. However, this Court should not rely upon the *Walker* decision because intervening changes to the Federal Rules of Civil Procedure have negated *Walker*'s applicability to the facts in this case. Under the 1980 version of Federal Rule 4(a)--with the "forthwith" issuance of a summons--the *Walker* Court held that the Federal Rules were not broad enough to control the definition of commencement and reasoned that the state law definition and the Federal Rules could exist side by side "without conflict." *Walker*, 446 U.S. at 750-52.[1] This

[1] In reaching this conclusion, the *Walker* Court stated:

conclusion is the analytical starting point of the *Walker* decision; in any case where the Federal Rules create a direct collision with the state law, *Walker* itself states that it is simply not applicable, and that the Federal Rule must be applied under *Hanna*.[2]

Despite their many factual similarities, there is one critical difference between the facts in this case and the facts in *Walker*: the 1993 Amendments to Rule 4 of the Federal Rules of Civil Procedure. By creating and enforcing a duty to commence litigation without the issuance and service of a summons,[3] the amendments to Rule 4 have created a direct collision with Kentucky law's absolute requirement of issuing a summons to commence a civil action.[4] Ky. R. Civ. P., Rule 3; Ky.

> This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. *The Federal Rules should be given their plain meaning.* If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.

Walker, 446 U.S. at 750 n.9 (emphasis added).

[2] In *Hanna*, this Court held that the Federal Rules, not the state law, control the manner of service of process in a diversity case. *Hanna*, 380 U.S. at 465. The Court stated that "in the absence of a conflicting state procedure, the Federal Rule would plainly control." *Id.* at 468. *Hanna* went on to state that *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), commanded the enforcement of state law only when the Federal Rule was not broad enough to cover the disputed point. *Id.* at 470.

[3] Amended Federal Rule 4 achieves this result by making the issuance of a summons not mandatory, punishing defendants for failing to waive service, giving defendants who waive service extra time to answer the complaint, and placing a duty on the parties to avoid the unnecessary costs of automatically issuing and serving summons. Fed. R. Civ. P., Rule 4(b), (d)(2), (d)(3).

[4] In *Hanna*, this Court held that the Federal Rule directly conflicted with the state rule because the state required service by hand delivery while the federal rule allowed delivery by other means (even though personal service was also allowed). In this case, the logical result of *Hanna* is that amended Federal Rule 4 conflicts with Kentucky law because the state requires issuance of a summons while the Federal Rule allows for a suit

Rev. Stat. § 413.250. While *Walker* may still stand for the application of state law where the Federal Rule is not broad enough to create a direct conflict, the intervening amendment to Federal Rule 4 wholly undermines any attempt to analyze this case under the *Walker* Court's analysis.[5]

The Respondents' contention that *Walker* resolves the question presented by the Petitioners demonstrates that the Respondents simply fail to appreciate the above argument. Nowhere is the Respondents' failure clearer than where they state that "[t]he various Circuit Courts, *when presented with this same issue*, have uniformly followed the rule of *Walker* and held that state law determines when limitations are tolled." Respondents' Brief in Opposition at 8 (emphasis added). In support of this assertion, the Respondents cite six cases, all of which were decided between 1988 and 1991. *Id.* Obviously, none of these pre-1993 cases could have discussed the 1993 Amendments to Rule 4, and thus could not have discussed whether those changes required a reconsideration of reliance on *Walker* on these facts. By arguing that these pre-1993 cases presented the "same issue" as is presented in this case, the Respondents demonstrate that they fail to understand the Petitioners' argument.

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to be maintained without the issuance of a summons (even though issuance of a summons is permitted and sometimes required).

[5] This analysis demonstrates that the Sixth Circuit should have relied upon this Court's decision of *Hanna v. Plumer* in this case. *Hanna* explains that if the Federal Rule is clearly applicable, then the only remaining analysis is to confirm that the Rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and within a constitutional grant of power such as the Necessary and Proper Clause of Article I. *Hanna*, 380 U.S. at 464. The Respondents do not dispute that the 1993 Amendments to the Federal Rules are within the scope of the Rules Enabling Act and a constitutional grant of power.

Finally, the Respondents make two other arguments that deserve brief mention. First, by taking a quotation out of context from the Rule 4 Advisory Committee Notes, the Respondents attempt to argue that the amended Rule 4 was not intended to change the result in *Walker*. Respondents' Brief in Opposition at 9. However, the Respondents fail to acknowledge that the quotation appears almost immediately after the Notes reference the *Walker* case. Advisory Committee Notes, Fed. R. Civ. P., Rule 4. Therefore, placed in its proper context, the quotation relied upon by the Respondents is not a statement of intent but instead nothing more than a simple recitation of the *Walker* holding.

Also, the Respondents assert that they were never asked to waive service of summons by the Petitioners in accordance with amended Rule 4. Respondents' Brief in Opposition at 3, 9. However, the Respondents do not support their statement as they fail to cite to the record in this case. Indeed, under amended Rule 4, the waiver is only filed with the court if the defendant agrees to waive service of summons. Fed. R. Civ. P., Rule 4(d)(4). Accordingly, the only point on which the record in this case is not silent is the fact that the Respondents did not waive service of summons. Because the record is silent about whether the Petitioners sought a waiver of service in this case, the Respondents' argument on this point must fail.[6]

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[6] The Respondents appear to raise this issue as one of fairness. While that argument fails for the reasons just detailed, this Court should note that the Petitioners' fairness argument has gone unchallenged by the Respondents. As a matter of fairness, the Federal Rules should be applied in this case to allow the Petitioners to have the same opportunity that they could have received had they originally filed their complaint in Kentucky state court. For a more detailed explanation of this argument, please see Petition at 11-12.

II. This Court Should Grant the Petition for Certiorari in Light of the Fact that the Respondents do not Dispute the Importance of the Question Presented

By failing to dispute the final paragraph of the petition, the Respondents concede the importance of the question presented by the Petitioners in this matter. Specifically, the Respondents do not dispute the Petitioners' assertion that the Sixth Circuit recognized the power of the Petitioners' argument herein, but felt trapped by the *Walker* holding. Petition at 13. Further, the Respondents concede that, unless this Court resolves the question presented by this petition, similar confusion will continue as other plaintiffs in diversity cases seek waiver of summons in the twelve (12) states--including New York--which define commencement of a civil action with some reference to the issuance, filing, or service of a summons. Petition at 13-14.[7]

In 1949, this Court decided the *Ragan* case, stating that certiorari was granted "because of the importance of the issue presented." *Ragan*, 337 U.S. at 532. Sixteen years later, in 1965, this Court heard the *Hanna* case because of the "threat to the goal of uniformity of federal procedure posed by the decision

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[7] The twelve states requiring the issuance, filing, or service of a summons for commencement are: Connecticut, Delaware, Kentucky, Minnesota, New Hampshire, New York, North Dakota, South Carolina, South Dakota, Tennessee, Washington, and Wisconsin. Conn. Gen. Stat. Ann. § 52-45a (filing of a writ of summons); Del. Ct. C.P. Civ. R., Rule 3 (filing of a praecipe directing the Clerk to issue a writ); Ky. R. Civ. P., Rule 3 (issuance of a summons); Minn. R. Civ. P., Rule 3.01 (service of a summons); N.H. Sup. Ct. R., Rule 3 (filing of a writ), and N.H. Dist. Ct. R., Rule 3.2 (same); N.Y. C.P.L.R. § 304 (filing of a summons); N.D. R. Civ. P., Rule 3 (service of a summons); S.C. R. Civ. P., Rule 3 (filing and service of a summons); S.D. Cod. L. § 15-2-30 (service of a summons); Tenn. R. Civ. P., Rule 3 (filing of a summons); Wash. Civ. R., Rule 3 (service of a summons); Wisc. Stat. Ann. § 801.02 (filing of a summons).

below." *Hanna*, 380 U.S. at 463. In 1980, fifteen years after *Hanna*, this Court decided the *Walker* case and an issue which "has troubled this Court for many years." *Walker*, 446 U.S. at 744. It is now sixteen years since the *Walker* decision and, like clockwork, an issue which was once thought decided has risen again due to an intervening amendment to the Federal Rules of Civil Procedure. The question presented in this petition is as important today as when this Court agreed to decide the *Ragan*, *Hanna*, and *Walker* cases. Therefore, this Court should grant certiorari, and review the Sixth Circuit's opinion in this case, so that this Court may again clarify the law on this important question.

CONCLUSION

For all of the reasons stated herein and in the Petition, the Petitioners respectfully contend that the Sixth Circuit decision below has decided an important federal question in a way that conflicts with the relevant decisions of this Court. As a consequence, Petitioners respectfully contend that this petition should be granted or, alternatively, that the decision below should be summarily reversed.

Respectfully Submitted,

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